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No. 04-1581

IN THE
Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC.,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF AMICUS CURIAE OF CITIZENS UNITED AND CITIZENS UNITED FOUNDATION IN SUPPORT OF APPELLANT

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INTEREST OF AMICI CURIAE

Citizens United ("CU"), a Virginia corporation, is a nonprofit educational and advocacy membership organization, exempt from federal income taxation pursuant to section 501(c)(4) of the Internal Revenue Code ("IRC"). CU is dedicated to certain important principles, including those of limited government, national sovereignty and rights secured under the United States Constitution, and it presents and communicates its views and the views of its members on legislative and public policy issues to federal, state and local government officials, as well as the general public. Citizens United Foundation ("CUF"), a Virginia corporation, is a nonprofit, nonpartisan, educational organization exempt from federal income taxation pursuant to IRC section 501(c)(3). CUF conducts research and informs and educates the public on a variety of issues of national importance, including issues related to belief in God, the role of traditional families and religious traditions in American society, the original intent of the Framers, and the correct interpretation of the United States Constitution.[1]

CU and CUF have filed *amicus curiae* and other briefs, in federal litigation, including matters before this Court. CU was a party plaintiff making a facial challenge to certain provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA") (Pub. L. 107-155) in McConnell v. FEC, 540 U.S. 93 (2003) ("McConnell"), upon which the court below purported to base

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief. These *amici curiae* requested and received the written consents of the parties to the filing of this *amicus curiae* brief, in the form of letters from counsel of record for appellant and appellee, and these have been submitted to the Clerk of Court for filing. *See* Sup. Ct. R. 37.3(a).

its decision denying consideration of Appellant Wisconsin Right to Life, Inc.'s ("WRTL") as-applied challenge to the prohibition against "electioneering communications" as defined in BCRA § 201 (2 U.S.C. § 434(f)(3)(A)(i)). CU and CUF both believe that the district court's decision refusing to consider the WRTL's constitutional challenge to the application of BCRA § 201's definition of "electioneering communications" to WRTL's particular issue ads misapplied the holding of the McConnell Court. Further, they believe that, had the district court correctly interpreted that holding, then the McConnell majority's decision on the constitutionality of BCRA § 201 was (a) an unconstitutional use of power inconsistent with Article III of the Constitution which limits the exercise of judicial power to cases and controversies, and (b) a denial of WRTL's liberty without due process of law in violation of the Fifth Amendment.

CU and CUF trust that their perspective on the issues — particularly due process and separation of powers principles — will be of assistance to the Court in deciding this appeal. Although the prohibition against electioneering communications by IRC section 501(c)(4) organizations, such as CU, has been in force since the passage of BCRA, to date communications by IRC section 501(c)(3) organizations, such as CUF, have been specifically exempted. *See* 11 CFR §100.29(c)(6). However, the regulation exempting 501(c)(3) organizations has been found lacking by the district court in Shays v. FEC, 337 F. Supp. 2d 28 (D.D.C. 2004), and the Federal Election Commission ("FEC") is considering new regulations on the subject. *See* FEC Notice of Proposed Rulemaking, 70 Fed. Reg. 16,967 (Apr. 4, 2005). According to the district court's reading of the McConnell opinion, any constitutional challenge to such proposed regulations as applied to a CU or CUF communication may be unreviewable on the merits.

In conducting their educational activities, these *amici* have already encountered rulings by the FEC that they believe infringe upon their constitutional rights of freedom of speech and press. For example, both CU and CUF have produced, and are planning to continue to produce, documentary films. With respect to the broadcast of such a film produced in 2004 — *Celsius 41.11* — CU sought from the FEC an exemption from the definition of electioneering communications under the news media exemption set forth in 11 CFR § 100.29(c)(2). On September 10, 2004, the FEC issued Advisory Opinion 2004-30, effectively denying the exemption by concluding (i) that the movie and its proposed broadcast advertising would qualify as electioneering communications if CU paid to broadcast them during BCRA's electioneering communications blackout period, and (ii) that the news media exemption did not apply to CU as it had not previously produced documentaries. Under the lower court's determination, it is possible that the FEC's Advisory Opinion 2004-30 could be construed as the final, non-appealable word on the subject, including its constitutionality.

In 2005, CU and CUF co-sponsored the production and distribution of *Broken Promises: The United Nations at 60*, a film of undeniable educational value, which mentions certain well-known figures who could become candidates for federal office in the foreseeable future. Other like documentary films dealing with other public policy issues are in the planning stage. Given the FEC's narrow interpretation of the news media exemption, and increasingly broad application of the electioneering communication regulations, the ruling of the three-judge court below — that the constitutionality of the FEC's application of the definition of "electioneering communications" are non-reviewable by an Article III court — could effectually censor many public educational messages, having nothing whatever to do with the evasive use of "sham issue ads" that led to the "electioneering communication"

regulations. Thus, CU and CUF have a strong interest in this case. Should this Court affirm the lower court's determination that substantially all "as-applied" challenges to the constitutionality of the "electioneering communication" definition are foreclosed by the decision in McConnell, such ruling would adversely impact CU's and CUF's educational missions in ways that the McConnell Court never considered.

SUMMARY OF ARGUMENT

Notwithstanding that WRTL was **not** a party to the McConnell litigation, that the July 2004 issue ads were **not** in evidence in that litigation, and that WRTL's constitutional claim was **not** made in that litigation, the district court below dismissed WRTL's constitutional challenge, **not** on the merits, but upon the sole ground that the reasoning of this Court in McConnell precluded judicial review. By failing to address on the merits WRTL's dramatically different constitutional claim that BCRA § 201's definition of "electioneering communication" **as applied** to certain issue ads composed and broadcast **after** McConnell was decided, the district court committed reversible error.

First, the District Court **misapplied** McConnell, erroneously ruling that the McConnell "reasoning" required dismissal of WRTL's constitutional claim without reaching the merits, instead of correctly applying the McConnell "reasoning" to ascertain whether that reasoning required a rejection of WRTL's claim on the merits. By misapplying McConnell to avoid deciding WRTL's claim on the merits, the court below, in effect, ruled that WRTL's constitutional claim is subject to the unreviewable power of the FEC. This extraordinary deferral to administrative discretion is not supported by a fair reading of the McConnell opinion upon which the district court relied. Moreover, the district court's misapplication of

McConnell denying judicial review to WRTL's "as applied" claim conflicts with BCRA § 403's authorization of comprehensive judicial review of the constitutionality of any provision of BCRA and the long-standing presumption favoring judicial review of the constitutionality of the actions of administrative agencies.

Second, the district court **misread** the McConnell decision, transforming it into an unconstitutional exercise of power to issue advisory opinions binding upon an entity that was not a party to the case. Additionally, it misread the McConnell decision in violation of the principle that constitutional claims should not be "adjudge[d] ... except when **definite** rights appear upon the one side and **definite** prejudicial interferences upon the other." *See* United Public Workers v. Mitchell, 330 U.S. 75, 90 (1947) (emphasis added). Even if the opinion in McConnell appeared to reach beyond the claims of the litigants in that case, it should not have been read to give the claim-preclusion effect accorded by the three-judge court below, which foreclosed WRTL from presenting a constitutional claim **not** made in McConnell on facts **not** introduced in McConnell by an entity **not** a party in McConnell.

Finally, the district court **misused** McConnell, by assuming the contents and circumstances of WRTL's issue ads were comparable to the issue ads in the McConnell record, and thus divorcing the McConnell "reasoning" from its factual setting. In doing so, the court below engaged in the very kind of abstract decision-making that the Article III, Section 2 limitation upon the exercise of judicial power was designed to prevent. Misusing McConnell to deny WRTL a right to be heard on its constitutional claim in an Article III court is a denial of WRTL's liberty without due process of law.

ARGUMENT

I. WRTL'S CLAIM WAS NOT PRESENTED IN THE MCCONNELL LITIGATION.

On February 14, 2002, the United States House of Representatives passed the Bipartisan Campaign Reform Act of 2002 ("BCRA") (Pub. L. 107-155). One month and six days later the BCRA passed the Senate. Prior to passage of the bill in the Senate, President George W. Bush was urged by many Congressional Republicans to veto the bill.[2] Despite such urging, the President did not veto BCRA, even though in his message announcing his decision to sign he stated that the "bill does have flaws ... present[ing] serious constitutional concerns." "President Signs Campaign Finance Reform Act," Statement by the President (March 27, 2002).[3] Among these stated concerns was the "broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election." *Id.* To justify his decision to sign the bill, notwithstanding his reservations about the constitutionality of some of its provisions, the President explained that he "expect[ed] that the **courts** will resolve these legitimate legal questions as appropriate under the law." *Id.* (emphasis added).

And that is precisely what occurred. On the very day after the President signed the bill, lawsuits challenging the

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[2] Reminding the President of his campaign promises — including the right of citizen groups to engage in issue advocacy — these elected representatives contended that BCRA "overtly violates the constitutional principles you swore as President to uphold." *See* March 4, 2002 letter to President Bush signed by 26 members of Congress http://johnshadegg.house.gov/rsc/word/CFRBushLetter2.doc.

[3] 38 Weekly Comp. Pres. Doc. 517-18 (Apr. 1, 2002).

constitutionality of almost every provision of BCRA were filed, as provided in BCRA § 403, subsection (a) of which authorized "any action ... for declaratory or injunctive relief to **challenge the constitutionality** of any provision of this Act or any amendment made by this Act." BCRA § 403(a) (emphasis added). Additionally, BCRA provided for relief on an "expedited" basis, by requiring a trial before a special three-judge federal district court in the District of Columbia, and a right of direct appeal to the United States Supreme Court, rather than the normal intermediate appeal to a United States Court of Appeals and discretionary review by the Supreme Court.

To ensure congressional monitoring of any judicial activity challenging its constitutionality, BCRA required that a "copy of [any] complaint [filed thereunder] ... be delivered promptly to the Clerk of the House of Representatives and to the Secretary of the Senate." *See* BCRA § 403(a)(2). Thus, any member of Congress would be put on the alert so as to take advantage of the special "right to intervene," conferred upon him by BCRA § 403(b). Further, if any member of Congress wished to challenge the constitutionality of BCRA, BCRA § 403(c) granted a special congressional right to "bring an action ... for declaratory or injunctive relief to challenge the constitutionality" of BCRA. By granting to themselves express statutory authority to intervene and to sue, BCRA § 403(b) and (c) were presumably designed to eliminate any question whether a member of Congress had suffered legal harm sufficient to meet the judicial standards governing standing to sue. *See, e.g.*, Raines v. Byrd, 521 U.S. 811 (1997).

On March 20, 2002, the very day that BCRA passed the Senate, after having previously passed the House, but before the President signed it into law, Senator Mitch McConnell — perhaps BCRA's most vocal opponent in Congress —

announced plans to launch a "swift Supreme Court challenge." *See* "Congress Approves Campaign Finance Reform," *U.S. Today* (Mar. 20, 2002).[4] On the very next day, Senator McConnell announced his legal team. And, on March 24, 2002, members of McConnell's "dream team" appeared on CNN's Late Edition discussing their constitutional objections to the new legislation. "CNN: Opponents of Campaign Finance Reform Vow to Go to Court" (Mar. 24, 2002).[5] So poised to strike, "[o]n the morning of March 27, 2002," and "[w]ithin hours" after President Bush signed BCRA into law, Senator McConnell filed his complaint in the District Court. McConnell v. FEC, 251 F. Supp. 2d 176, 206 (D.D.C. 2003). Although the National Rifle Association beat Senator McConnell to the courthouse door, Senator McConnell's name was placed at the head of an eventual crowd of "eighty-four plaintiffs challenging twenty-three provisions of BCRA." *Id.* at 208.

As large as this group of plaintiffs became, WRTL was not among them. *See* McConnell v. FEC, 251 F. Supp. 2d 176, 221-26 (D.D.C. 2003) (*per curiam* opinion). Nor were the three issue ads composed and broadcast by WRTL among the "issue ads" considered by the three-judge district court, having been composed and broadcast in 2004, after the McConnell trial had ended. *See* WRTL Jurisdictional Statement ("WRTL Jur. Stmt."), Appendix, pp. 13a-17a (May 23, 2005). Nor was the constitutional argument submitted by WRTL in the court below considered either by the three-judge district court or the Supreme Court in the McConnell case. *See* McConnell v. FEC, 251 F. Supp. 2d 176 (D.D.C. 2003), *aff'd in part and rev'd in part*, 540 U.S. 93. Indeed, the Supreme Court in McConnell

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[4] Reprinted in http://www.campaignlegalcenter.org/press-810.html.

[5] http://www.cnn.com/TRANSCRIPTS/0203/24/le.00.html.

decided that BCRA's Title II definition of "electioneering communications" was constitutional **solely** on its face and **solely** on the ground that it need not conform to the Buckley[6] standard of "express advocacy" of the election or defeat of a named candidate for election to a federal office. *See* McConnell v. FEC, 540 U.S. 93, 187-194 (2003). In the court below, however, WRTL has put forward a very different constitutional claim, contending that, **as applied** to the three issue ads dated July 15, 2004, BCRA's Title II definition does not draw a constitutionally defensible line between genuine and sham issue ads. *See* WRTL Jur. Stmt. at 24-30.

Notwithstanding that (a) WRTL was **not** a party to the McConnell litigation, (b) WRTL's July 2004 issue ads were **not** in evidence in that litigation, and (c) WRTL's as applied constitutional claim was **not** made in that litigation, the three-judge court below dismissed WRTL's constitutional challenge, **not** on the merits, but upon the sole ground that "the reasoning of the McConnell Court leaves **no** room for the kind of 'as applied' challenge WRTL propounds before us." *See* WRTL v. FEC, Order (May 10, 2005); Memorandum and Order (May 10, 2005); and Memorandum Opinion and Order (August 17, 2004) ("Mem. Op."), reprinted in WRTL Jur. Stmt. at 1a, 2a-3a, and 4a-17a. For the reasons stated below, this ruling is patently erroneous.

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[6] Buckley v. Valeo, 424 U.S. 1 (1976).

II. BCRA SECTION 403 AFFIRMATIVELY PROVIDES FOR JUDICIAL REVIEW ON THE MERITS OF WRTL'S CONSTITUTIONAL CLAIM IN THIS CASE.

The ruling of the court below, that this Court's five-person majority holding that BCRA's definition of "electioneering communication" on its face precludes WRTL's constitutional challenge to that definition **as applied**, is breathtaking, both with respect to its foundation and to its implications. The primary basis for its ruling is a footnote wherein the McConnell majority, in explanation as to why it did not reach the constitutionality of a statutory backup definition, stated:

> **We uphold all applications** of the primary definition and accordingly have no occasion to discuss the backup definition. [McConnell v. FEC, 540 U.S. at 190 n.73 (emphasis added). *See* Mem. Op., WRTL Jur. Stmt. at 7a.]

This sentence, coupled with the fact that the majority did not "expressly" state that the primary definition might be subject to an "as applied" constitutional challenge in the future — as it had done with respect to the other facial challenges to BCRA — persuaded the court below to rule that WRTL's as applied constitutional challenge should be dismissed without any judicial review of the merits. *Id.*

At first, the court below appears to have read the footnoted statement literally — that **all** applications of BCRA § 201's definition to ads referring to a candidate for election to federal office broadcast in the future are constitutional. Mem. Op., WRTL Jur. Stmt. at 7a. On closer reading, it appears that it asserted that the McConnell footnote indicates that "some applications of that definition" have been prejudged as

constitutional, and thus, claims challenging them can be dismissed without any adjudication on the merits. *Id.*, Mem. Op., WRTL Jur. Stmt. at 7a. But it does not provide any guidance as to which applications have been prejudged and which ones have not. Instead, it simply ruled by fiat that the "**reasoning** of the McConnell court leaves no room ... for the kind of 'as applied' challenge WRTL propounds before us." *Id.*, Mem. Op., WRTL Jur. Stmt. at 7a. Indeed, in order to explain why the McConnell "reasoning" precluded an adjudication of the WRTL's constitutional claim on the merits, the court below would have had to demonstrate why the McConnell "reasoning" covered the three issue ads before it. To accomplish that goal, the court below, in turn, would have been required to rule against WRTL's claim **on its merits**, not dismiss that claim outright solely on the strength of the McConnell footnote. For that reason alone, the ruling of the court below should be reversed and remanded.

Furthermore, by denying altogether WRTL's opportunity to obtain judicial review **on the merits** of the constitutionality of BCRA's definition of an "electioneering communication" as applied to an issue ad that was **not** before the McConnell Court, the court below failed to read the McConnell decision in light of the "strong presumption that Congress intends judicial review of administrative action." *See* Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986). BCRA § 403 contains no express exceptions to its broad conferral of jurisdiction on a three-judge court in the District of Columbia for actions "brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act." But the district court's reading of the McConnell majority footnote created an exception, denying judicial review on the merits of any constitutional claim challenging the application of BCRA § 201's definition that a court concludes is barred by the

McConnell majority's "reasoning."

In effect, the court below interpreted McConnell to have established an exception to the normal rule that the constitutionality of agency action is subject to judicial review, absent "clear and convincing evidence" of the statutory language to the contrary. *See* Weinberger v. Salfi, 422 U.S. 749, 762 (1975). While this rule is normally applied when a court is faced with a statute that could be construed to deny judicial review of actions of an administrative agency, the reason for presuming that a statute does not cut off Article III court review applies equally to an interpretation of a judicial opinion. For example, the court below placed great emphasis upon the fact that the McConnell opinion did not "expressly" state that "as applied" constitutional challenges to BCRA § 201 "would remain available." Mem. Op., WRTL Jur. Stmt. at 7a-8a. According to this Court's decision in Bowen, however, "'[t]he mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.'" Bowen, 476 U.S. at 671.

The same rule governing statutory interpretation should prevail in the reading of a court opinion. Judicial silence on Article III court review no more indicates unreviewability of the constitutionality of action taken by an administrative agency than does congressional silence. To rule to the contrary from the failure of the McConnell Court to expressly preserve as applied constitutional challenges to BCRA § 201 would carve out an exception to BCRA § 403(a) that provides for the comprehensive review of the "constitutionality of **any** [of its] provision[s]," whether on its face or as applied.

This Court has previously characterized the preclusion of judicial consideration of an issue arising from administrative action as "extraordinary, such that 'clear and convincing'

evidence would be required before we would ascribe such intent to Congress, ... but it would have raised a serious constitutional question of the validity of the statute as so construed." Weinberger v. Salfi, 422 U.S. at 762. Likewise here, the three-judge court's "extraordinary" reading of the McConnell footnote and its failure to to expressly reserve as applied challenges to BCRA § 201 raises a serious constitutional question of the validity of the McConnell opinion. After all, the Supreme Court has no such power to limit the jurisdiction of the federal courts. It is for Congress to confer jurisdiction on the courts,[7] not for courts to refuse jurisdiction where conferred absent constitutional justification. *See* Muskrat v. United States, 219 U.S. 346 (1911).

In short, the three-judge court's reading of the McConnell Court's rejection of a facial challenge to BCRA § 201 to preclude an "as applied" constitutional claim **not** raised in McConnell, on facts **not** introduced in McConnell by an entity **not** a party in McConnell, is "fundamentally at odds with the function of the federal courts in our constitutional plan." *See* Younger v. Harris, 401 U.S. 37, 52 (1971). As Justice Black observed, facial attacks on statutes in the courts are the rare exception, because "[t]he power and duty of the judiciary to declare laws unconstitutional [are] ... derived from its responsibility for resolving concrete disputes [wherein] a statute apparently governing a dispute cannot be **applied** by judges, consistently with their obligations under the Supremacy Clause, when such an **application** of the statute would conflict with the Constitution." *Id.* (emphasis added).

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[7] *See* U.S. Constitution, Article I, Section 8, Clause 18 and Article III, Sections 1 and 2, Clause 2. *See also* Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1869).

III. THE READING OF MCCONNELL BY THE COURT BELOW TRANSFORMS THAT DECISION INTO AN UNCONSTITUTIONAL EXERCISE OF JUDICIAL POWER.

A. The Court Below Misread McConnell as a Binding Advisory Opinion.

In Muskrat v. United States, 219 U.S. 346, 349-50 (1911), this Court refused to render a decision on the merits on the ground that the jurisdiction conferred upon the federal courts by Congress was contrary to the limitations on judicial power found in Article III of the Constitution. In support of this ruling, this Court observed that "there was **no general veto power** in the court upon the legislation of Congress" **nor** any "**revisory power** over the action of Congress." *Id.*, 219 U.S. at 357, 361 (emphasis added). Yet, BCRA § 403 invites the judiciary to employ both of these proscribed powers.

By inviting expedited review, BCRA § 403 — like a comparable judicial review provision in the 1996 Line Item Veto Act — shifted the federal courts to the front line of constitutional controversy, (a) facilitating the President's ability to treat judicial review as a substitute for the presidential veto,[8] rather than (b) preserving the federal judiciary's Article III role whereby "'federal courts may exercise power only "in the last resort, and as a necessity."'" *See* Raines v. Byrd, 521 U.S. 811, 819 (1997). Additionally, by granting members of Congress statutory standing to sue, BCRA § 403 invited the Court to exercise "revisory power," subjecting BCRA to the possibility

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[8] *See* Amar and Amar, "Breaking Constitutional Faith: President Bush and Campaign Finance Reform" (Apr. 5, 2002) http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/amar20020405.html.

of "judicial surgery" which could excise portions of the statute before it would ever be enforced.[9] In fact, Congress placed in BCRA § 201's definition of "electioneering communication" — the BCRA provision at issue in the case at bar — a "back up" definition should the primary definition be "held to be constitutionally insufficient by final judicial decision." *See* 2 U.S.C. § 434(f)(3)(A)(ii).

Prior to McConnell, this Court stated that it has "always insisted on strict compliance with [its] jurisdictional standing requirement[,] [a]nd [its] standing inquiry has been especially rigorous when reaching the merits of the dispute would force [the Court] to decide whether action taken by one of the other two branches of the Federal Government was unconstitutional." Raines v. Byrd, 521 U.S. at 819-20. Indeed, in past cases, this Court has generally eschewed the temptation to decide any constitutional issue other than the one specifically before it, taking special precautions in an action challenging a statute on its face, because "the task of analyzing a proposed statute, pinpointing its deficiencies, and requiring correction of these deficiencies **before** the statute is put into effect, is rarely ... ever an appropriate task for the judiciary." Younger v. Harris, 401 U.S. at 52 (emphasis added).

Nevertheless, the three-judge court below read the McConnell majority opinion upholding BCRA § 201 on its face to preclude WRTL's as applied constitutional challenge. By construing McConnell case as having precluded litigation of WRTL's novel constitutional claim based upon new facts, the district court has undermined the essential function of judicial review, transforming the courts into "commissions assigned to pass judgment on the validity of the Nation's laws," instead of

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[9] *See* Amar and Amar, "Breaking Constitutional Faith," *supra*.

places of last resort rendering "[c]onstitutional judgments ... out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court." *See* Broadrick v. Oklahoma, 413 U.S. 601, 610-11 (1973). Instead of guarding against reading the McConnell majority ruling as an advisory opinion applicable to constitutional claims of persons not parties to the case on facts not in the record, the district court misread that opinion as an advisory one **binding** upon such parties regardless of the differences in fact and claim. In doing so, the court below violated a cardinal rule of this Court that "[i]t would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when **definite** rights appear upon the one side and **definite** prejudicial interferences upon the other." *See* United Public Workers v. Mitchell, 330 U.S. 75, 90 (1947) (emphasis added).

B. The Court Below Misread McConnell as Having Resolved a Case Not Before It.

The McConnell majority did not examine the question whether any plaintiff had standing to wage a constitutional challenge to BCRA Title II (*see* McConnell, 540 U.S. at 189-212). Yet, one should not yield to the temptation to read its opinion apart from the constitutional principle that "Article III of the Constitution limits 'the judicial power' to the resolution of 'cases' and 'controversies,'" a "bedrock element of which is that plaintiffs must establish that they have standing to sue." McConnell, 540 U.S. at 225 (Rehnquist, C.J., writing for the Court and dismissing several non-Title II claims for lack of standing). Otherwise, one might read the McConnell majority opinion too broadly, just as the district court has done in this case.

Of special importance to this case, the McConnell majority utterly failed to address the question whether members of Congress had standing. To be sure, BCRA § 403(c) had purported to confer such standing, but such statutory conferral in the past has not ensured that such members could, thereby, obtain a judicial decision on the merits of their constitutional claim. Rather, just six years before McConnell, this Court — under a strikingly similar set of provisions expediting judicial review of the controversial Line Item Veto Act on its face — rebuffed Senator Robert Byrd and his five congressional colleagues, concluding that they did not have a sufficiently "personal stake" in the outcome so as to have standing to sue. Raines v. Byrd, 521 U.S. at 818-864. In doing so, this Court "put aside the natural urge to proceed directly to the merits of this important dispute and to 'settle' it for the sake of convenience and necessity," adhering to a "careful[] inquir[y] as to whether [the members of Congress] have met their burden of establishing that their claimed injury is personal, particularized, concrete and otherwise judicially cognizable." *Id.*, 521 U.S. at 820.

By ruling against Senator Byrd, the Raines Court distinguished between a constitutional claim essentially based "on a loss of political power" and a "private right" (*id.*, 521 U.S. at 821), in recognition of the fact that permitting members of Congress to litigate a constitutional claim in their capacity as the elected representatives of the people runs the risk of premature finality, in which the judicial settlement of a political dispute between contending legislators may spill over into a lawsuit involving personal and concrete legal injury suffered by a constituent in a real case or controversy. *See* Raines, 521 U.S. at 829. And that is exactly what has happened here to WRTL in the court below.

Although Senator McConnell was only one of many

plaintiffs to file a constitutional challenge to BCRA, he and his lawyers dominated the proceedings. Indeed, before the Supreme Court, Senator McConnell's handpicked lawyers argued the cause for all plaintiffs, except the political parties, labor unions and minors. Now, the district court has, in effect, saddled WRTL with that loss, ruling that the McConnell case "upheld the electioneering communication provisions ... in their entirety" (Mem. Op., WRTL Jur. Stmt. at 7a), apparently upon the novel assumption that WRTL's interest was adequately represented by the lawyers designated by the Court to argue for the plaintiff parties in that case.[10]

But our system of judicial review does not accommodate such vicarious representation. *See* Broadrick, 413 U.S. at 610. Indeed, this Court has guarded against resolving political disputes at the request of persons who "wished to act contrary to [the] provisions [of the Hatch Act] ... and desire[d] a declaration of the legally permissible limits of regulation" because they had no "personal stake" in the outcome. *See* United Public Workers v. Mitchell, 330 U.S. 75, 84, 89-91 (1947). As was true of Mitchell, **none** of the plaintiffs in McConnell alleged — nor could have alleged — that they had taken action in violation of BCRA. Rather, as in Mitchell, the plaintiffs in McConnell had alleged that they wished in the future to engage in "political activity" that appeared to be unconstitutionally regulated by BCRA. In Mitchell, this Court refused to entertain a similar facial challenge to the constitutionality of the Hatch Act, finding " the general threat of possible interference with [constitutional] rights ... if specified things are done ... does not make a justiciable case or controversy":

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[10] *See* McConnell, 157 L.Ed.2d at 529.

> Appellants want to engage in 'political management and political campaigns,' to persuade others to follow appellants' views by discussion, speeches, articles and other acts reasonably designed to secure the selection of appellants' political choices. Such **generality of objection** is really an attack on **the political expediency** of the Hatch Act, **not the presentation of legal issues.** It is **beyond the competence of courts to render such a decision.** [*Id.*, 330 U.S. at 89 (emphasis added).]

This excerpt from Mitchell is especially telling when applied to the challenge to the Title II provisions on "electioneering communications." There is no question that the plaintiffs in McConnell generally alleged that they were intending to engage in the composition and broadcast of issue ads in upcoming elections. But no plaintiff could have introduced into evidence WRTL's three ads that are at issue in this case. Rather, the evidence consisted largely, if not exclusively, of studies of issue ads — and actual issue ads — crafted **before** BCRA and, therefore, crafted under the more lax Buckley express advocacy standard. *See* McConnell, 251 F. Supp. 2d. at 227-33, 237-50. In contrast, WRTL's three ads were composed **after** BCRA and, therefore, not "infected" by the previously-prevailing Buckley "magic word" formula. Therefore, the references to a candidate for election to federal office could not be **presumed** to be just a "cover" for a "sham" attack ad.

The McConnell majority's assessment of the facial constitutionality of BCRA's definition of "electioneering communication" focused on past ads, not future ones. Indeed, in addressing the facial attack on BCRA § 201 under this Court's vagueness and overbreadth doctrines, the McConnell

majority made only a single reference to the judicial findings below, namely, that "Buckley's magic-words requirement is functionally meaningless." McConnell, 540 U.S. at 193. In support of that finding, the McConnell majority made only two references to the evidentiary record, one to testimony that "magic words" — like vote for or against — "would seldom [be] cho[sen] ... even if permitted" and another to an ad that, although it did not contain any magic words, "no less clearly intended to influence the election." *Id.*

Having found such evidentiary support to discount the old standard governing electioneering ads, the McConnell majority made no effort whatsoever to determine if the new BCRA standard might be applied unconstitutionally to any ad that would be crafted and broadcast under the new law. Nor did it examine the record to determine whether its two factual findings demonstrate **also** that the lines of demarcation set forth in BCRA § 201 are sufficiently "meaningful [to] distinguish electioneering from a **true** issue ad." *Id.* Indeed, had the McConnell majority even attempted to address that question, it could not have done so as there was no such evidence in the trial record. Thus, the McConnell majority opined that the BCRA definition of "electioneering communication" was constitutional on its face, without knowing how it could be applied to an "issue ad" composed and broadcast after BCRA.

To read the McConnell "reasoning" as having definitively resolved the constitutionality of future applications of BCRA § 201's definition of an "electioneering communication" would not only do violence to the McConnell evidentiary record, but would disregard the McConnell majority's treatment of the old Buckley express advocacy standard. In supporting its rejection of that standard as a broad constitutional one, in favor of one tied to a particular statute, the Court stated that "we have long 'rigidly adhered' to the tenet '**never** to formulate a rule of

constitutional law broader than is required by **the precise facts** to which it is to be applied.'" McConnell, 540 U.S. at 192 (emphasis added). Neglecting this reminder, the district court misread McConnell to accomplish just the opposite, precluding WRTL from presenting a constitutional claim **not** made in McConnell on facts **not** introduced in McConnell by an entity **not** a party in McConnell.

C. The Court Below Misread the Application of the Overbreadth Rule in McConnell.

Plaintiffs' overbreadth challenge in McConnell to BCRA § 201's definition of "electioneering communication" — that it was unconstitutional as applied to an unspecified number of constitutionally-protected issue ads — did not dispense with the jurisdictional requirement that, in order to wage an overbreadth challenge, the plaintiffs must allege and prove a personal injury, or threat of such injury, to themselves. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972). The standing exception in overbreadth cases simply permits a litigant — who otherwise has standing to sue — to **raise** third party constitutional claims, **not to resolve those claims** on the merits against persons not parties to the case. For example, the plaintiffs in Broadrick v. Oklahoma, 413 U.S. 601 (1973), were charged with violating the law. By rejecting their overbreadth challenge, the Court did not rule that the statute was therefore constitutional as applied to others. Rather, it simply ruled that the threat to the constitutional rights of third parties posed by the challenged statute was not "substantial" enough to warrant a decision in favor of a person whose actions are not constitutionally protected. *See* Broadrick, 413 U.S. at 615-16. Nor did the Broadrick Court's "reasoning" foreclose a future as applied challenge. Rather, the Court's reasoning was, as in McConnell, tailored to the facts and constitutional claims made by the parties in the immediate case. *See* Broadrick, 413 U.S.

at 616-18.

The district court, however, misconstrued the McConnell Court's overbreadth decision to have cast a much wider net, not only to catch the "issue ads" before it, but subsequent ones as well. In doing so, the district court gave more than instructive effect to McConnell in a ruling on the merits; indeed, the district court gave McConnell *res judicata* effect. Instead of taking into account the "reasoning" of the McConnell court in relation to the facts therein, and applying that "reasoning" to the new facts presented by WRTL, it lifted that "reasoning" out of the factual context in McConnell and dismissed the case as one that had already been decided. This result could only be reached by a misreading of the overbreadth doctrine.

By making no effort to place the McConnell "reasoning" into any factual setting, the district court engaged in the very kind of abstract decision-making that the Article III, Section 2 limitation upon judicial power was designed to prevent. This Court has employed its "overbreadth doctrine ... sparingly and only as a last resort," because the overbreadth inquiry requires the Court to examine a statute to ascertain whether it "may deter protected speech to some **unknown** extent." *See* Broadrick, 413 U.S. at 613, 615 (emphasis added). By abstracting footnote 73 from the McConnell factual setting, the court below violated this salutary rule, projecting the McConnell Court's reasoning onto an issue ad — the contents and circumstances of which were **unknown** to the McConnell Court — without any comparative analysis of the facts that shaped the McConnell ruling on the facial constitutionality of BCRA's definition of "electioneering communication."

As Justice Hugo Black put it, "the task of analyzing a proposed statute, pinpointing its deficiencies and requiring correction of those deficiencies **before** the statute is put into

effect, is rarely if ever an appropriate task for the judiciary." Younger, 401 U.S. at 52 (emphasis added). While it may be argued that plaintiffs' facial challenge in McConnell to BCRA's definition of "electioneering communication" was one of those rare occasions, it should be remembered that **none** of the plaintiffs in McConnell had been charged with a violation of, or threatened with enforcement of, the provision of BCRA § 201. Even if plaintiffs may raise third-party claims under the overbreadth doctrine, the McConnell majority opinion should be read circumspectly, **not** expansively as the district court did, so as not to extend its "reasoning" beyond the facts of the case to "ill-defined controversies" not then before the Court. *See* Mitchell, 330 U.S. at 91.

IV. THE COURT BELOW MISUSED MCCONNELL TO DENY WRTL'S LIBERTY WITHOUT DUE PROCESS OF LAW.

According to the three-judge court below, the McConnell majority's ruling that BCRA's definition of "electioneering communication" was constitutional on its face foreclosed WRTL's opportunity to show that definition to be unconstitutional as applied to three specified issue ads. Mem. Op., WRTL Jur. Stmt. at 7a-8a. In partial support of its claim, WRTL cited a recent FEC ruling that the broadcast of a car dealer's ad referring to the car dealer's name is not governed by section 201 of BCRA, even though the ad clearly referred to the car dealer who was at the time a candidate for election to federal office. WRTL Jur. Stmt. at 2. Additionally, the FEC has addressed other issues respecting the scope and application of the electioneering communication rules to documentaries, documentary films, and broadcast ads for such films, ruling that section 201 of BCRA does not apply to certain documentaries, but does apply to others, and that section 201 does apply to advertisements for all documentaries. *See* FEC Advisory

Opinion 2004-30. If the district court's ruling stands, it may very well leave future constitutional challenges to the application of BCRA § 201's definition of electioneering communication unheard by any federal court, establishing the FEC as the final arbiter regarding the constitutionality of its own actions.

A. McConnell Adjudicated the Issue that BCRA's Definition of Electioneering Communication Was Constitutionally Justified Against a Facial Attack.

As discovery got underway in McConnell v. FEC, the proceedings quickly took the form of a legislative hearing, rather than a pre-trial proceeding. In fact, as the discovery process unfolded, it resembled the battle between the proponents and opponents of BCRA as it had unfolded in the Congress. By the time that the parties completed the extensive discovery process,[11] it became abundantly clear that the litigation focused on whether the provisions of BCRA were constitutionally **justified**, **not** whether the provisions of BCRA would be constitutional in all their varied **applications.** *See* McConnell v. FEC, 251 F. Supp. 2d at 220, 233-265.

On appeal, the policy nature of the district court's proceedings became even more pronounced. For example,

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[11] Utilizing a streamlined discovery process, with depositions replacing live testimony, the three-judge McConnell court developed a "paper" trial record, dispensing with the examination of witnesses in open court. By the time oral arguments were scheduled in December 2002, briefs totaling 1,676 pages and proposed findings of fact coming to 576 pages were submitted to the court, along with "forty-one boxes (plus thirteen additional binders), which by conservative estimation comprised the testimony and declarations of over 200 fact and expert witnesses and over 100,000 pages of material." McConnell v. FEC, 251 F. Supp. 2d at 208-09.

rather than opening its opinion with the traditional statement of the case before it — including identification of the contesting parties, a summary of the salient facts, the disposition of the court below, and the scope of review governing the case — the McConnell majority began with a historical reference to the "opinion" of a single person that unregulated "political contributions by corporations" was "'a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions,'" immediately followed by the undocumented assertion that this one man's "judgment" has been endorsed by the "Congress of the United States [with] repeatedly enacted legislation," the latest being BCRA. *See* McConnell v. FEC, 540 U.S. at 115. From this tendentious beginning, the McConnell majority continued: (a) tracing the history of congressional legislation; (b) charting a path of progressively tighter and tighter federal reins on contributions and expenditures of money in political campaigns; (c) noting "its steady improvement of the national election laws" with the enactment of the Federal Election Campaign Act of 1971 and its 1974 amendments; and (d) observing this progression to have culminated with the enactment of BCRA. *See id.*, 540 U.S. at 115-17.

After this brief account of the history of campaign finance regulation, the McConnell majority launched into a "commentary" on the three "important developments [that] persuaded Congress" to enact BCRA: (a) the "solicitation, transfer, and use of **soft money** [that] enabled parties and candidates to **circumvent** FECA's limitations on the source and amount of contributions in connection with federal elections" (*id.*, 540 U.S. at 118-126 (emphasis added)); (b) the use of "**soft money**" to air "**[s]o-called issue ads** ... without disclosing the identity of, or any other information about, their sponsors" (*id.*, 540 U.S. at 125-126 (emphasis added)); and (c)

the 1998 Senate Committee on Governmental Affairs report that the "'**soft-money loophole**' had led to a 'meltdown' of the campaign finance system." *Id*, 540 U.S. at 129 (emphasis added).

Remarkably, the McConnell majority substituted this "commentary" for what ordinarily would have been a statement of the facts of the case. To be sure, it supported its commentary by footnoted references to the opinions of the three judges of the district court below, but the McConnell majority made no effort to make sure that the facts supporting its commentary could be found in the *per curiam* decision below, or in at least the opinions of two of the three judges below, as contrasted to the opinion of only one of the three trial judges, or no opinion at all. *Compare* footnotes 7, 8, 22, 23 (*per curiam*) 14, 15, 16, 17, 18, 19, 20, 21 (two or more judges) *with* footnotes 9, 10, 24, and 25 (Judge Kollar-Kotelly) and footnotes 11 (Mann Expert Report), 13 (Declaration of Gerald Greenwald, and Brief for Committee for Economic Development as Amici Curiae), and 26-37 (Senate Report No. 105-167 (1998)). Indeed, the McConnell majority elevated the testimony of a single senator — citing to the Senate Report over the trial record — as having "provided overwhelming evidence that the **twin loopholes of soft money and bogus issue advertising have virtually destroyed our campaign finance laws.**" McConnell, 540 U.S. at 126 (emphasis added).

When the McConnell majority turned its attention to the constitutionality of BCRA § 201, it limited its inquiry **solely** to the question whether, in light of the historical record of past legislation, the Buckley express advocacy rule was constitutionally mandated. *See* McConnell, 540 U.S. at 189-95. Concluding that the statutory language at issue in Buckley and the Buckley Court's reasoning demonstrated otherwise, the McConnell majority considered the claim of facial invalidity to

be conclusively resolved. *Id.* at 192-95. In so ruling that the McConnell majority did not adjudge the constitutionality of the BCRA § 201 definition "in [its] entirety," as the district court concluded. *See* Mem. Op., WRTL Jur. Stmt. at 7a. It certainly made no attempt to adjudicate the constitutionality of that definition by any standard other then the old Buckley express advocacy standard.

To be sure, the McConnell majority did write in footnote 73 that "[w]e uphold **all applications of the primary definition** and accordingly have no occasion to discuss the backup definition." 540 U.S. at 190 n.73. But that language should not be construed to mean that, by rejecting the facial attack upon BCRA § 201's primary definition of "electioneering communication," the McConnell majority had resolved that the definition would be constitutional as applied to any ad — even one not in the McConnell evidentiary record — that "refers to a clearly identified candidate for federal office." *See* Mem. Op., Jur. Stmt. at 6a-7a.

Such a reading of the McConnell majority opinion turns the doctrine of overbreadth on its head by, in effect, granting standing to a party to contest the application of BCRA § 201 to a third party "to some unknown extent,"[12] and then denying standing to a third party, the first party having failed to convince the McConnell majority that the statute was overbroad. Instead, as the Broadrick Court clearly acknowledged, when a party fails to satisfy the burden of demonstrating substantiality, then "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanction may, assertedly, not be applied." Broadrick, 413 U.S. at 615-16.

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[12] *See* Broadrick, 413 U.S. at 615.

WRTL appears to have attempted to make just such a case in the court below, but the three-judge district court disallowed it, asserting that the McConnell majority's ruling foreclosed any judicial review on the merits of WRTL's constitutional claim. Yet, the three-judge court pointed to nothing in the McConnell majority opinion indicating why the normal rule of case-by-case adjudication, as described in Broadrick, would not apply.

B. The District Court's Failure to Follow the Broadrick Rule Denied WRTL Its Liberty Without Due Process of Law.

The district court's decision dismissing WRTL's constitutional challenge without reaching its merits permits the FEC to exercise judicially unreviewable discretion to resolve WRTL's constitutional objection to the application of that definition to its three ads and, presumably, to any other issue ad which refers clearly to a candidate for election to federal office. Such constitutional deference to an administrative agency is unprecedented.

In Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986), this Court has affirmed the right of judicial review of executive action, citing Chief Justice Marshall who wrote:

> "It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right ... between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process ... leaving to the debtor no remedy, no appeal to the laws of his country, if

> he should believe the claim to be unjust." [*Id.*, 476 U.S. at 670.]

From this quotation in Bowen, administrative law experts, Professors Alfred C. Aman, Jr. and William T. Mayton, have inferred that "[u]nder Article III and in a government of separated powers, the general and undiminished function of the courts is to assure that agencies conform to the Constitution ...." A. Aman and W. Mayton, Administrative Law 362 (West Group, St. Paul: 2001). Further, Professors Aman and Mayton have written that "[t]he unconstitutionality of absolute preclusion of judicial review may be deduced from the courts' function, under *Marbury v. Madison*, of assuring that government in all its parts operates within constitutionally prescribed limits." *Id.* at 362, n. 14. *See also* Ralpho v. Bell, 569 F.2d 607, 620, *reh'g denied*, 569 F.2d 636 (D.C. Cir. 1977).

In light of these principles, this Court has stated that it "cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." Leedom v. Kyne, 358 U.S. 184, 190 (1958). As demonstrated in Argument I above, Congress has clearly granted access without exception to the courts to test the constitutionality of any provision of BCRA. *See* BCRA § 403. The district court's reading of McConnell, carving out an exception for certain as applied constitutional challenges to BCRA's definition of electioneering communication, flies in the face of that grant of jurisdiction. And, if sustained, it would deny WRTL of its liberty without due process of law, having denied to WRTL access to the very department established by the Constitution to "say what the law is." Marbury v. Madison, 5 U.S. 167, 179 (1803). If due process of law means anything, it means that a right secured by the United States Constitution — the supreme law of the land — cannot be denied by an

administrative agency in its unreviewable discretion.

CONCLUSION

For the foregoing reasons, the district court's dismissal of WRTL's complaint should be reversed.

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